In The

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1958

No. 936

BLUM VESTAL JOHNSON and
COMMIE ALLEN JOHNSON,
Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RAYMOND KYLE HAYES
T. R BRYAN
Attorneys for Petitioners

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The petitioners, Blum Vestal Johnson and Commie Allen Johnson, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

Opinion Below

The per curiam opinion of the Court of Appeals (Petitioner's Appendix 1) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on April 8, 1959. The petition for re-hearing was denied on April 21, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

Questions Presented

1. May the United States cite specific statutes and sustain a conviction as principals when the evidence against the defendants at most would show them to be only aiders and abetters?

2. Is the sufficiency of the evidence in a single case one of general importance to suffice an order of review by the Supreme Court?

3. Does the opinion in the instant case conflict with the holdings of the Supreme Court of the United States in *Bozza* vs. *United States*, 67 S. Ct. 645, 330 U. S. 160?

Statutes Involved

The statutory provisions involved are 26 U.S.C.A., Sections 5601, 5606, 5216 and 5008; Title 18 U.S.C.A., Section 2; and Rule 7 (c) of the Federal Rules of Criminal Procedure.

Statement

The defendants, Blum Vestal Johnson and Commie Allen Johnson, along with two other defendants, were charged

in a bill of indictment containing four counts, for the violation of Title 26 USC Sections 5601, 5606, 5216, and 5008. The other two defendants, Enoch Clay Johnson and James Gilbert Johnson, entered pleas of Guilty when the case was called for trial in the District Court. The defendants, Blum Vestal Johnson and Commie Allen Johnson, entered pleas of Not Guilty and went to the jury. The charges were that they possessed a still set up without having registered same as required by law; that they carried on the business of a distiller without having given bond as required by law; that they fermented mash fit for distillation on premises other than a distillery authorized according to law; that they possessed distilled spirits in containers which did not have the required stamps affixed thereto. The petitioners were arrested while asleep in an automobile approximately one and one-half mile from the scene of the distillery. Commie Allen Johnson, at the time of his arrest, had mash on his clothing and was in the front seat of the automobile which was titled in his mother's name and which he claimed, and which automobile bore the same license plate as had been identified on a car traveling up a public road some distance from the distillery. He had a flash light with him which he claimed. Blum Vestal Johnson was in the back seat of the car with clean clothing on with the exception that his pant legs were damp and some weed seeds were on his clothing. A flash light was laying up on the back seat with an amber colored glass therein. The distillery was seized about 2:30 in the morning and the other two defendants, Enoch Clay Johnson and James Gilbert Johnson, were arrested at the distillery. The petitioners were arrested at the point indicated about 5:30 on the same morning.

The jury convicted the petitioners and from a sentence of 18 months as to Blum Vestal Johnson and 15 months as

to Commie Allen Johnson, they appealed to the United States Court of Appeals for the Fourth Circuit.

Reasons for Granting the Writ

Rule 7 (c) of the Federal Rules of Criminal Procedure requires that: "The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated."

Title 18 U.S.C.A. section 2, provides:

> "(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.
>
> (b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."

Title 18 USCA section 2 was not set out in the bill of indictment and there was no charge in the bill of indictment of aiding or abetting and there was no evidence before the court as to the petitioners guilt except as aiders or abetters. The possession of the distillery was in Enoch Clay Johnson and James Gilbert Johnson, the other two defendants who pleaded guilty. As to Count 2 in the charge Enoch Clay Johnson and James Gilbert Johnson were the ones there carrying on the business of a distillery without having given bond as required by law. Enoch Clay Johnson and James Gilbert Johnson were in possession of the fermented mash fit for distillation, and the distilled spirits

in containers that did not have the required stamps were in the possession of Enoch Clay Johnson and James Gilbert Johnson.

The petitioners were tried as principals and convicted as such without the citation of the statute which Congress has seen fit to enact making those who aid, abet or assist guilty as principal. If the Federal Rules of Criminal Procedure are enacted for the purpose of depriving the defendant of his rights then the defendants cannot complain at the failure of the government to cite Title 18 USCA section 2. If they are enacted to do equal justice between the United States and the defendant then their case ought to be reviewed.

The degree of proof required before the case may be submitted to the jury is a question of general importance and where the allegations in the indictment are lacking in proof to the extent they are in the instant case against these petitioner then the court should grant a writ of certiorari.

In the case of *United States* v. *Smith*, 67 S. Ct. 1330, 331 U. S. 469, decided June 2, 1947, this court in discussing the Federal Rules of Criminal Procedure held that the court was without power to extend the five day limit on making motions for new trial. It is apparent from the cited case that the rule against the defendant is strictly construed and it ought to be as strictly construed as against the government.

The petitioners cite the case of *Bozza* v. *United States*, 67 S. Ct. 645, 330 U.S. 160, decided February 17, 1947, and we quote from Justice Black's opinion as follows:

"The Internal Revenue statutes have broken down the

various steps and phases of a continuous illicit distilling business and made each of them a separate offense. Thus, these statutes have clearly carved out the conduct of making mash as a separate offense, thereby distinguishing it from the other offenses involving other steps and phases of the distilling business. Consequently, testimony to prove this separate offense of making mash must point directly to conduct within the narrow margins which the statute alone defines. One who neither engages in the conduct specifically prohibited, nor aids and abets it, does not violate the section which prohibits it.

"The sufficiency of the evidence as to count two which charged that the petitioner had custody or possession of the still is a closer question. It might be possible that petitioner's helping to make the alcohol aided and abetted in its "custody or possession." But that would be a very strained inference under any circumstances. Here again the statutes treat custody or possession as a wholly distinct offense. Yet there was no testimony that the petitioner ever exercised, or aided the exercise of, any control over the distillery. His participation in carrying the finished product by car does not fit the category of "custody and possession" so nearly as it resembles the transportation of illegal liquor, 26 U.S.C. 2803, 26 U.S.C.A. Int. Rev. Code, 2803—an offense which the Circuit Court of Appeals has found the evidence insufficient to prove. Nor was there any testimony that the petitioner acted in any other capacity calculated to facilitate the custody or possession, such as, for illustration, service as a caretaker, watchman, lookout or in some other similar capacity."

In the instant case the government failed to show that

these petitioners were ever closer to the distillery than where they were arrested, which was approximately one and one-half mile away, and under the Bozza case above cited we do not see how the instant case can be otherwise than in conflict with the decisions of this Court in the Bozza case.

The petitioners also contend that the opinion in the instant case conflicts with the opinion of the Fourth Circuit in the case of *Johnson* vs. *United States*, 207 F. 2d 461.

Therefore, your petitioners respectfully contend that they are entitled to have the Court grant the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, and pray that such order be made.

Respectfully submitted,

RAYMOND KYLE HAYES

T. R. BRYAN

Attorneys for Petitioners

PETITIONER'S APPENDIX 1

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 7806.

BLUM VESTAL JOHNSON and
COMMIE ALLEN JOHNSON,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, AT WILKESBORO. EDWIN M. STANLEY, DISTRICT JUDGE.

(Argued April 6, 1959. Decided April 8, 1959.)

Before SOBELOFF, Chief Judge, and BOREMAN and THOMPSON, District Judges.

Kyle Hayes and T. R. Bryan for Appellants, and H. Vernon Hart, Assistant United States Attorney, (James E. Holshouser, United States Attorney, and Lafayette Wil-

liams, Assistant United States Attorney, on brief) for Appellee.

PER CURIAM:

Appellants were tried on an indictment, containing the usual counts, charging the operation of an unregistered distillery. Following the presentation of the government's evidence, the defendants moved for a directed verdict of acquittal, which motion the Court overruled. The case was submitted to the jury, the defendants having presented no evidence in their own behalf. The jury returned a verdict of guilty; and the defendants moved to set aside the verdict, which motion was also overruled.

On this appeal, the only question presented is whether the Court erred in overruling the motions of the defendants.

Upon a motion for a directed verdict of acquittal in a criminal case, the test is whether there is substantial evidence which, viewed in the light most favorable to the government, tends to show that the defendant is guilty beyond a reasonable doubt; and the rule is the same whether the evidence is direct or circumstantial. *Linden* v. *United States*, 254 F. 2d 560 (4 Cir, 1958); *Bell* v. *United States*, 185 F. 2d 302 (4 Cir. 1950). In the instant case, although wholly circumstantial, there was clearly sufficient evidence from which a reasonable mind might fairly conclude guilt beyond a reasonable doubt. Although we have closely scrutinized and appraised the sufficiency of the evidence in the case before us, it would serve no useful purpose to detail the evidence here since each decision in this field must be based on the particular facts of the case. See *Bell* v. *United States*, supra, at page 310.

On a motion to set aside a verdict and grant a new trial on the ground that it is contrary to the evidence, the trial court is invested with a wide discretion, and his action thereon will not be disturbed in the absence of a showing of an abuse of discretion. *Middleton* v. *United States*, 249 F. 2d 719 (4 Cir. 1957). In the instant case, there is nothing to indicate such abuse.

Affirmed.